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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-283

STATE OF DELAWARE,

Petitioner,

v.

SARA C. HUNTER,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent hereby moves the Court for leave to proceed in forma pauperis and without prepayment of fees. Respondent was found to be indigent by the Office of the Public Defender of the State of Delaware, was represented in the trial court and before the Supreme Court of the State of Delaware by the Office of the Public Defender.

Respectfully submitted,

RICHARD M. BALMEISTER
Assistant Public Defender
Office of the Public Defender
State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-3230

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-283

STATE OF DELAWARE,

Petitioner,

v.

SARA C. HUNTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Sara C. Hunter, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; that I was represented at all steps in the proceedings before the courts, including the Supreme Court, of the State of Delaware by the Office of the Public Defender and therefore no leave to proceed in forma pauperis was required.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the matter are true.

1. Are you presently employed? Yes.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   $490.00 per month. Daybreak Lodge, Inc., 2801 West Sixth Street, Wilmington, Delaware 19805.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   Not applicable.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

1. David William Chambers, son
2. Linwood Kim Chambers, son
3. William Franklin Hunter, son
4. Donald Alexander Hunter, son
5. Mark Anthony Hunter, son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Sara C. Hunter
SARA C. HUNTER

SUBSCRIBED AND SWORN TO before me this 22nd day of September, 1980.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

David Lukoff
Notary Public

JUSTICE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-283

STATE OF DELAWARE,

Petitioner,

v.

SARA C. HUNTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

CERTIFICATION OF SERVICE AND MAILING

BE IT REMEMBERED that on this 22nd day of September, 1980, personally appeared before me, a Notary Public for the State of Delaware and New Castle County, Richard M. Baumeister, Esquire, who being by me duly sworn did depose and say:

1. That he is attorney for Respondent.

2. That he caused to be placed in State Mail two copies of Respondent's Brief for the Respondent in Opposition in the above-captioned matter to Charles M. Oberly, III, Esquire, Deputy Attorney General, attorney for Petitioner.

3. That he caused to be placed in a United States Post Office, with first-class postage prepaid, and properly addressed to the Clerk of

the United States Supreme Court, within the time allowed for filing, a copy of Respondent's Brief in Opposition, as required by Rule 28 and that to the best of his knowledge the mailing took place on September 22, 1980, within the permitted time.

RICHARD M. BAUMEISTER
Assistant Public Defender

SWORN TO AND SUBSCRIBED by me the day and year aforesaid.

Notary Public

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SUPREME COURT, U.S.

IN THE

SURPEME COURT OF THE UNITED STATES

October Term, 1980

No. 80-233

STATE OF DELAWARE,

Petitioner,

v.

SARA C. HUNTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE RESPONDENT IN OPPOSITION

RICHARD M. BAUMEISTER
Assistant Public Defender
Office of the Public Defender
State Office Building
820 North French Street
Wilmington, DE 19801

Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-283

STATE OF DELAWARE,

Petitioner,

v.

SARA C. HUNTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE RESPONDENT IN OPPOSITION

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Delaware, which is not yet reported, is attached to the Petition for Writ of Certiorari filed by Petitioner, the State of Delaware, in its Appendix "A".

OPPOSITION TO JURISDICTION

Petitioner, the State of Delaware, has failed to raise an issue of federal constitutional dimension. See Respondent's Reasons For Denying the Writ. Argument I, infra. In addition, Petitioner conceded that multiple punishments violate double jeopardy, a point clearly noted in Justice Quillen's concurrence. Petitioner's Appendix "A-15". cf. Raley v. Ohio, 360 U.S. 423, 435 (1958); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1967).

QUESTION PRESENTED

Respondent respectfully submits that there is no federal question presented; regardless, Respondent notes that Petitioner has clearly mistated the Question Presented by the Delaware Supreme Court's decision and the possible federal question more accurately might be:

Does the Double Jeopardy Clause of the Fifth Amendment to the United Stated Constitution, as applied to the States through the Fourteenth Amendment, prevent the imposition of multiple punishments for two crimes which can be classified as the "same offense," as defined by Blockburger v. United States, 284 U.S. 299 (1932).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are set forth in the Petition for Writ of Certiorari, except as follows:

Constitution of the State of Delaware, 1897, Article I, §8.

> No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and no person shall be for the same offense twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made.

STATUTORY PROVISIONS INVOLVED

The Delaware statutory provisions involved are set forth in the Petition for Writ of Certiorari, except as follows:

11 Del.C. §208(1)(b)(1).

> Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution in a court having jurisdiction over the subject matter of the second prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in §207 of this title and the subsequent prosecution is for:
>
> a. Any offense of which the defendant could have been convicted on the first prosecution; or

b. The same conduct, unless:

1. The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil, or

2. The second offense was not consummated when the former trial began.

STATEMENT OF THE CASE

Respondent concurs with the statement of the case as outlined in the State of Delaware's Petition for Writ of Certiorari with the following exceptions.

On March 14, 1980, the Supreme Court of Delaware, sitting en banc, affirmed Respondent's convictions but reversed the consecutive sentencing, holding that Article I, §8, of the Delaware Constitution precluded the consecutive sentences. After this Honorable Court's decision in Whalen v. United States, _____ U.S. _____, 63 L.Ed.2d 715 (1980), the Delaware Supreme Court granted reargument; the Supreme Court of Delaware, by a three-to-two vote, held Whalen v. United States, id., inapplicable.

RESPONDENT'S REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT A FEDERAL QUESTION.

Respondent respectfully submits that Petitioner's argument is incorrect. Respondent submits that the decision of the Delaware Supreme Court rested on independent State constitutional law. In its opinion, the Delaware Supreme Court stated in part:

> The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". The Delaware Constitution, Article I, §8, similarly provides that no person shall be twice put in jeopardy "for the same offense". We have little helpful case law under the State Constitutional provision, see e.g., State v. Turner, Del.Supr., 168 A.2d 539 (1961); State v. Hamilton, Del.Super., 318 A.2d 624 (1974); but there are several recent helpful pronouncements on the subject by the United States Supreme Court. [Emphasis added].

Hunter v. State, supra, Petitioner's Appendix "A-10". It is obvious that

the federal constitutional issue was not the basis for this decision; the Delaware Constitution provides a prohibition against double jeopardy and the Delaware Supreme Court turned to recent pronouncements of the Unites States Supreme Court only to assist in its interpretation of the Delaware Constitution. Petitioner has clearly ignored language in Hunter, supra, that this case rests upon provisions contained in the Delaware Constitution. In the Hunter Reargument, the inference could be drawn that the Delaware Supreme Court relied on the Federal Constitution; however, Respondent submits that the Delaware Supreme Court was asked to review its decision in light of Whalen. In rejecting the application of Whalen to the case at bar, the Delaware Supreme Court left unchanged its previous determination of the applicability of Article I, §8, of the Delaware Constitution. This Honorable Court has stated that it will not review a matter and retain jurisdiction if the State question is the polestar for the lower Court's decision. Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194 (1965). See also, Henry v. Mississippi, 379 U.S. 443 (1965); Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965); Whalen v. United States, supra, 63 L.Ed.2d at 733 (dissenting, Rehnquist). In support of this contention, Respondent directs this Honorable Court's attention to the Reargument and Clarification in Hunter. Chief Justice Herrmann speaking for the majority notes a Blockburger-like rule of Legislative enactment, much similar to the District of Columbia Code provisions mentioned in Whalen v. United States, supra, 63 L.Ed.2d at 725. It is obvious that the Delaware Legislature, in its enactment of 11 Del.C. §208 (1)(b)(1), has established a Blockburger-like rule. The Chief Justice stated:

> [I]t does not mean, however, that we may not adopt a Blockburger-like rule of substantive law to determine when two sentences constitute punishment for the "same offenses". 11 Del.C. §208(1)(b)(1) essentially states a Blockburger-like rule of substantive law to determine when two offenses are essentially the same when the statute says "the offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former prosecution and the law defining each of the offenses is intended to prevent a substantially different harm or evil . . ."

Chief Justice Herrmann makes it clear for the majority that double jeopardy principles apply to the Legislature and this issue is one of state interpretation of the State Constitution and the separation of powers as implied in the State system.

For the above reasons, Respondent submits that Hunter v. State, supra, rests upon adequate and independent State Constitutional and Statutory grounds; in the alternative, this case should be remanded for clarification of the State grounds. Pennsylvania v. Campana, 414 U.S. 808 (1973).

II. THE DECISION BELOW IS CORRECT

Respondent submits that the decision below is correct and the correctness of that decision is not disturbed by this Honorable Court's decision in Whalen v. United States, supra. Even though Chief Justice Herrmann clearly distinguished the Whalen case from Hunter, Petitioner misconceives the relevance of Whalen, and this misconception is multi-based. There are four critical errors in Petitioner's argument: Petitioner has failed to take into account the differences in factual background between Hunter and Whalen; Petitioner has ignored settled case law in the Federal system; Petitioner has misconstrued the minority viewpoints in Whalen as expressions of the majority decision; and Petitioner has failed to consider the unique and differing roles of the state and federal courts in our Federal system.

Petitioner quotes Whalen: "Congress is clearly free to fashion exceptions to the rule it chose to enacting §23-1132." Petitioner's Brief for Certiorari at 10. Petitioner clearly lifted this summary of the majority opinion out of context. The full import of the majority opinion was that Congress was free to fashion exceptions to the District of Columbia Code, but Congress had not done so; and the Court refused to do so, citing the constitutionally madated relationships between the various branches of Federal government. Chief Justice Herrmann clearly noted this distinction in the Hunter Reargument:

> [W]e are presented with a question wholly different than that posed in Whalen. There the concern was the scope of the Double Jeopardy Clause when cumulative punishment for the identical crime is imposed contrary

> to the intent of Congress. Here, we are confronted with the question of the scope of the Double Jeopardy Clause when cumulative punishment is meted out for the "same offense" consistent with the will of the General Assembly.

Petitioner's Appendix "A-20". Petitioner has clearly misunderstood the distinctions between Hunter and Whalen.

The second quotation Petitioner uses from Whalen has to do with the problem faced in Gore v. United States, 357 U.S. 386 (1958), where this Honorable Court was called upon to decide if the imposition of multiple punishments for multiple drug charges amounted to a violation of double jeopardy. Petitioner's Brief for Certiorari at 10. A Court's determination of what punishment is mandated by the legislative branch is only the first step and not the only step, as Petitioner would have us believe; the next step for a court to consider is whether those punishments amount to a violation of double jeopardy as defined by settled case law. The distinct roles of the legislative branch and judicial branch are delineated in Brown v. Ohio, 432 U.S. 161 (1977):

> [T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

Id., at 165. In making its decision, the Delaware Supreme Court reviewed the impressive history of the concept of double jeopardy and found helpful many notable decisions by this Honorable Court, Ex Parte Lange, 85 U.S. (18 Wall) 163 (1873), Blockburger v. United States, supra, North Carolina v. Pearce, supra, Brown v. Ohio, supra. Petitioner completely ignores settled federal case law when it implies that the Whalen decision negates these previous decisions. Whalen clearly does not negate these decisions. See Busic v. United States, supra.

Petitioner erroneously calls attention to the viewpoints of four members of the court in Whalen to demonstrate that the Hunter decision

is incorrect. Petitioner's Brief for Certiorari at 10-12. These viewpoints, however cogent, are expressions of a minority position; yet, Petitioner would construe these minority viewpoints as the majority viewpoint. Many decisions of this Honorable Court contain quite divergent views of the various members. Petitioner, by applying a minority gloss of a majority opinion to appraise the validity of its position, is engaging in a flight of fancy.

Lastly, Petitioner states, "The State of Delaware believes the Delaware Supreme Court erred in holding that the Fifth Amendment of the United States Constitution proscribes cumulative punishments in factual situations such as that of this case where the legislature clearly called for such sentences." Petitioner's Brief for Certiorari at 9. To accept Petitioner's contention regarding the bounds of the double jeopardy protection, would be to require this Honorable Court and the Delaware Supreme Court to abdicate their individual constitutional responsibilities, thereby removing from our system a most fundamental check and balance on legislative power--judicial review. The effect of having this Honorable Court or the Delaware Supreme Court abdicate responsibility for judicial review would be to overturn this important concept as expressed in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Respondent submits that this step in our development of law would be unthinkable.

III. REVIEW IS NOT NECESSARY TO PREVENT FURTHER CONFUSION.

Respondent submits that there is no confusion. See Respondent's Arguments I and II, supra.

CONCLUSION

The Petition for Writ of Certiorari should be denied, or in the alternative this matter should be remanded to the Supreme Court of the State of Delaware for clarification.

Respectfully submitted,

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Attorney for Respondent